

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

36-6

BRIEF FOR APPELLANT

✓

In the
United States Court of Appeals
For the District of Columbia Circuit

No. 24,038

UNITED STATES OF AMERICA,

Appellee,

v.

RONALD PROCTOR,

Appellant.

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 17 1970

Nathan J. Paulson
CLERK

Joseph Paull *OK*
Attorney for Appellant
(Appointed by this Court)
1730 Rhode Island Ave., N.W.
Washington, D. C. 20036
Telephone: 223-4580

TABLE OF CONTENTS

	Page
CITATIONS	ii
ISSUES PRESENTED FOR REVIEW	iv
STATEMENT OF THE CASE	1
ARGUMENT	3 - 21

CITATIONS

	Page
<u>Bennett v. United States</u> , 101 App. D.C. 413, (1957) 249 F.2d 505	11
<u>Bloomer v. United States</u> , 409 F.2d 869 (9th Cir. 1959)	14
<u>Coleman v. United States</u> , 123 U.S. App. D.C. 103 (1965), 357 F.2d 563.	18
<u>Heard v. United States</u> , 121 U.S. App. D.C. 37 (1964), 348 F.2d 43	21
<u>Hanson v. United States</u> , 393 F.2d 763	14
<u>Langnes v. Green</u> , 282 U.S. 531 (1931)	18
<u>Lewis v. United States</u> , 119 U.S. App. D.C. 145 (1964), 334 F.2d 541.	21
<u>Macklin v. United States</u> , U.S. App. D.C. No. 21,945, decided March 25, 1969	11
<u>Scott v. United States</u> , No. 20,954 U.S. App. D.C., decided February 13, 1969	18
<u>Townsend v. Burke</u> , 334 U.S. 736, 58 S.Ct. 1252	18
<u>United States v. Damon Alston</u> , _____ U.S. App. D.C. _____, 420 F.2d 176 (1969)	13
* <u>United States v. Carter</u> , U.S. App. D.C. No. 22,912, decided June 5, 1970.	20
* <u>United States v. Lawrence M. Green</u> , U.S. App. D.C. No. 23,156, decided June 17, 1970	8
<u>United States v. Collins</u> , No. 22,550, U.S. App. D.C., decided August 23, 1970.	21

<u>United States v. James McCoy</u> , US App D.C. Nos. 22,797 and 23,090, decided June 19, 1970. . . .	15, 18
<u>United States v. Mullings</u> , 364 F.2d 173 (2nd Cir. 1966)	12
<u>United States v. Straite</u> , _____ U.S. App. D.C. _____ (1970) 425 F.2d 594	18
<u>Albert Watson v. United States</u> , U.S. App. D.C. Nos. 21,186, 21,269 (1970)	18
<u>United States v. Louis W. Gaines</u> , No. 23,369 USCA D.C., decided August 27, 1970.	21
Rule 24 of the Federal Rules of Criminal Procedure	13
Federal Youth Corrections Act 18 USC 5005	15, 17
22 D.C. Code 3202 (1967 Ed.)	11
22 D.C. Code 3202 (1967 Ed.)	11

* Cases or authorities chiefly relied upon are marked
by asterisks.

ISSUES PRESENTED FOR REVIEW

- (1) WHETHER IN A JURY TRIAL, WHERE THE PRESIDING JUDGE AT A BENCH CONFERENCE EXPRESSES THE VIEW THAT THE DEFENDANT IS GUILTY, STATES THAT HE IS NOT CONCERNED WITH PREJUDICE AND DECLARES THAT THE DEFENDANT'S CASE IS DESPERATE, A FAIR TRIAL IS POSSIBLE.
- (2) WHETHER IT WAS PROPER TO ADMIT INTO EVIDENCE A REVOLVER WHICH WAS NEVER IDENTIFIED BY DESCRIPTION OR OTHERWISE AS THE WEAPON USED IN THE ROBBERY.
- (3) WHETHER THE JUDGE HAD POWER TO DEPRIVE THE DEFENDANT OF THE RIGHT TO COPY THE JURY LIST, AND IN EXERCISING THAT POWER, DID THE JUDGE ACT TO THE DEFENDANT'S PREJUDICE.
- (4) WHETHER THIS COURT CAN REVIEW AND SET ASIDE AS ERRORNEOUSLY BASED A 10 TO 30 YEAR SENTENCE FOR ARMED ROBBERY, THE SENTENCE BEING BASED IN PART APPARENTLY UPON ERRONEOUS INFORMATION THAT THE DEFENDANT RECEIVED A TWO-YEAR SENTENCE AS AN ADULT OFFENDER WHEN HE WAS IN FACT A JUVENILE.
- (5) WHETHER THE JUDGE UPON BEING INFORMED THAT THE DEFENDANT WAS A HEAVY USER OF HEROIN SHOULD HAVE SUA SPONTE ORDERED AN EXAMINATION TO DETERMINE WHETHER THE CRIME WAS THE PRODUCT OF THE EFFECTS OF THE HABITUAL USE OF HEROIN, AND WHETHER THE TRIAL SHOULD HAVE BEEN ADJOURNED UNTIL A MEDICAL DETERMINATION WAS MADE AS TO WHETHER THE DEFENDANT WAS FIT TO STAND TRIAL.

- - - -

The pending case was not previously before this Court under this or any other title.

REFERENCES TO RULINGS - NONE

STATEMENT OF THE CASE

One James E. McKnight, the complainant, was an attendant at a parking lot at 12th and C Streets, S. W., across from the Agriculture Department Annex (Tr. 12) at 5:55 P.M. December 4, 1968, (Tr. 13). While he was in the shack of the lot and preparing to go home, two men opened the door. One announced that it was a stickup (Tr. 14). The other tied the complainant's hands and, after searching the shack, took from him \$36-\$37 in money (Tr. 17), a copper four-leaf clover and a good-luck charm (Tr. 18).

McKnight was able to view his assailants' faces "Just for a second. Well, a little more than a second, I imagine. Maybe half the time they was there. When he turned me around, that is when I didn't anymore look at their faces." (Tr. 17)

A chrome plated revolver, which McKnight said 'looks like the gun' (Tr. 21) was introduced in evidence.

After tying up McKnight and telling him to remain there for five minutes, the robbers left the shack and ran toward the Annex (Tr. 22), met a third man, in green pants (Tr. 23), all three men getting into a red automobile across the street. McKnight ran to a parked cab

driven by a friend (Tr. 24), and they drove off after the robbers (Tr. 25-26). McKnight lost sight of the red car for a few minutes, (Tr. 114-115). At 14th Street and Pennsylvania Avenue, N. W., amid heavy traffic, McKnight hailed a traffic policeman, who ordered the driver of the red car to pull over (Tr. 32). A man jumped from the front seat (Tr. 34) dropping something which appeared to be a gun. Police pulled their revolvers (Tr. 34). The dropped gun was the chrome-plated weapon introduced into evidence.

McKnight recognized Proctor among those in the car as the robber who bound him. McKnight also recognized Dockery, a somewhat casual acquaintance (Tr. 36). Dockery was a co-defendant.

Currency approximating the amount taken, the copper four-leaf clover and a religious gold piece, the aforementioned good-luck charm, were found in the console and on the back seat of the car in which Proctor and the others were arrested (Tr. 36).

On cross-examination, McKnight said he identified Proctor at a lineup (Tr. 73) as one of the men who robbed him in the shack.

The driver of the car was William Akers, a co-defendant. Another passenger was Peter J. Trantham, a co-defendant.

At the end of the first day of trial, (December 15, 1969) the following transpired (Tr. 117):

THE COURT: (Referring to Proctor) Your defendant, Mr. Bowers, is copying down the names and the addresses of the jurors. If I hear any indication of any contact with the jurors, why I am going to have to inquire into that with some care.

MR. BOWERS: I don't blame you. I would do the same thing.

THE COURT: It was quite apparent. We did take back some of the list from him, but I don't think that necessarily is a function of a defendant.

MR. BOWERS: Right, I agree with you.

At page 207 of the transcript, at a bench conference, the following transpired:

THE COURT: . . . I am sure he (Dockery) is guilty. I am not talking about that. I am talking about your proof. I am not talking about anything else. I haven't any doubt that this was a common venture, but

you have to prove it.

MR. BARNES: Your Honor, may I move to strike that from the record.

THE COURT: No, that is my personal view. The jury will have to make its own decision about it.

At page 235 of the transcript, the judge made the following remarks outside the presence of the jury:

MR. RUDEN: Your Honor, that would be highly prejudicial.

THE COURT: All trials are prejudicial. I am concerned with whether it is proper examination. Prejudicial problems don't interest me.

The above was in reference to the following:

In the automobile, police found a black gun stuffed into the rear seat of the car (Tr. 139), near where Proctor was sitting and between him and Trantham (Tr. 140). There was no evidence of that weapon or of any second gun having been used in the robbery.

The Court initially rejected the second gun as evidence of the Government's case-in-chief (Tr. 185). After much testimony about the finding of the gun, it was admitted into evidence (Tr. 426).

The jury was cautioned that there was no charge as to carrying a dangerous weapon involved in the case (Tr. 429).

In instructing the jury, the judge mentioned that two guns were in evidence (Tr. 511).

The jury found Proctor, Trantham and Akers all guilty of armed robbery and assault with a dangerous weapon.

Proctor was sentenced to serve 10-30 years in prison for armed robbery and concurrently, 3-10 years for the assault with a dangerous weapon. Bail was denied and he is at this writing incarcerated in Lorton Reformatory.

In allocution prior to sentence, Proctor said he wished to be rehabilitated, if possible. The judge replied, "That is always up to you." He then imposed sentence, (Sentencing Transcript Page 2).

Proctor was 19 years of age when the offense was committed. He had an extensive juvenile record and as an "adult" in 1966, when he could not have been more than 17 years of age, received a two year sentence in Maryland for shoplifting and was paroled after six months. While on bond in the present case, he was charged with robbery, possessing implements of crime, burglary II, attempted

robbery and carrying a dangerous weapon. He was convicted only of the last-mentioned charge and received 90 days in jail.

He has been addicted to heroin since 1968, was using over 20 capsules a day in 1968, and when evidence of narcotics was found in a nearby courtroom during the trial, a physical examination and urinalysis was ordered, but no further disposition was indicated. (See Government's opposition to Motion for Release Pending Appeal)

In a memorandum dated April 7, 1970 concerning denial of bail pending appeal and which is part of the record of this case, the trial judge observed that the grounds for appeal were frivolous. He stated that Proctor had "an extensive record as a juvenile and two other convictions as an adult, one involving an offense committed while he was on bond in this case."

He stated that Proctor had been committed to correctional facilities as a juvenile in 1962 for housebreaking, in 1964 for carnal knowledge and in 1965 for petty larceny, and five other arrests for housebreaking, unlawful entry, "two UUVs", and one petty larceny.

The judge said Proctor was convicted as "an adult"

in the spring of 1966 for shoplifting, and while on bond was charged with robbery, "CDW", possessing implements of crime, second degree burglary, and attempted robbery and "ADW" but that all charges except for the "CDW" were dismissed.

- (1) WHETHER IN A JURY TRIAL, WHERE THE PRESIDING JUDGE AT A BENCH CONFERENCE EXPRESSES THE VIEW THAT THE DEFENDANT IS GUILTY, STATES THAT HE IS NOT CONCERNED WITH PREJUDICE AND DECLARES THAT THE DEFENDANT'S CASE IS DESPERATE, A FAIR TRIAL IS POSSIBLE.

(Please read Tr. 207 and Tr. 235)

Shortly after the Government completed its case, the Court at bench conferences made very clear his view of the case. He declared:

1. He was sure that Dockery was guilty.
2. He had no doubt the defendants were engaged in a common venture.
3. He was interested not in prejudice problems but in the properness of cross-examination.

Appellant Proctor does not contend that the jury heard the Court's comments. But at least, the comments had to have a chilling effect upon defense counsel, and at least one counsel objected after a fashion. That the objection was framed toward the record is perhaps an indication of the taut-ship control by that particular judge, but it can be surmised that the reins of defense counsel were taut also. (cf United States v. Lawrence M. Green, U.S. App. D.C. No. 23,156, decided June 17, 1970.

Appellant's contention on this point is a very narrow one. Appellant was entitled in this jury trial to a judge who did not close his mind to the evidence as it developed. In the trial here, the judge had made up his mind even before appellant Proctor testified.

- (2) WHETHER IT WAS PROPER TO ADMIT INTO EVIDENCE A REVOLVER WHICH WAS NEVER IDENTIFIED BY DESCRIPTION OR OTHERWISE AS THE WEAPON USED IN THE ROBBERY.

(Please read Tr. 139, 140, 185, 234, 235, 344, 346, 426, 429)

A gun not even similar in appearance to and not identified as having been used in the robbery was the subject of testimony and was introduced into evidence by the Government. The gun had been found by police in the automobile near where Proctor had been sitting. That this evidence was prejudicial was acknowledged by the Court, which said it was nevertheless properly in evidence. That the judge cautioned the jury that Proctor was not charged with carrying a deadly weapon did not ameliorate any prejudice which may have been involved.

Proctor was charged with armed robbery. There was no evidence that he was in fact armed, although another person, never apprehended and charged, was present with Proctor, according to the evidence, and held the gun during the robbery. This revolver, a chrome-plated object, was found outside the automobile in which Proctor had been riding and from which a man had just fled. and was introduced into evidence by the Government.

The jury may well have found Proctor guilty of robbery and not robbery while armed, had it not been for the evidence of the second gun. Had this been the case, Proctor could not have been sentenced to in excess of 15 years in prison 22 D.C. Code 3202 (1967 Ed.), 22 D.C. Code 2901 (1967 Ed.).

Nor can it be contended that Proctor opened himself up to the presentation against him of the evidence of this gun. Rather, Appellee with considerable persistence and ingenuity, and with some guidance from the Court, managed to get the evidence of the gun admitted into the case.

Had Proctor been charged with carrying a deadly weapon, evidence of the gun would have been admissible against him on that charge. (Bennett v. United States, 101 U.S. App. D.C. 413 (1957) 249 F.2d 505. But there was no showing whatever that this gun was used in this robbery, only that this gun was in the car driven from the scene of the robbery. Hence, the evidence was inadmissible and clearly prejudicial.

This case is well within the doctrine of Macklin v. United States, U.S. App. D.C. No. 21,945, decided March 25, 1969, although there is concededly a differing factual situation. Yet the point of Macklin is clearly

applicable here. The risk of prejudice in admitting the gun evidence was great. Its probative value was relatively slight. The impeachment value was little. The embarrassment potential was enormous. See also, United States v. Mullings, 364 F.2d 173 (2d Cir. 1966)

- (3) WHETHER THE JUDGE HAD POWER TO DEPRIVE THE DEFENDANT OF THE RIGHT TO COPY THE JURY LIST, AND IN EXERCISING THAT POWER, DID THE JUDGE ACT TO THE DEFENDANT'S PREJUDICE.

(Please read Tr. 117)

At the end of the first day of trial, the Court informed defense counsel that the jury list had been taken away from the defendant Proctor.

It is unclear from the transcript whether the Court was referring to the master list or to the venire of 25 prospective jurors from which the panel was to be chosen.

In either event, the judge, although acting doubtless out of the best motives to protect the jurors, deprived Proctor of a right.

Rule 24 of the Federal Rules of Criminal Procedure governs jury examination and challenges and permits either the defendant or his attorney, and the attorney for the Government to conduct the examination.

To take away the jury list from the defendant is, on the face of it, high-handed. To do so because of some fear of contact, when the Court had no indication that there would be any contact, is unwarranted.

The jury list is not a closed document. It becomes

part of the case in the trial court, although it is not usually presented as part of the record on appeal.

The defendant may have wanted the list to see if he recognized names or addresses, whether he was known to any juror, whether any of the jurors had sat in similar cases or were prone to convict. There were a host of valid reasons.

A fair jury is part, of course, of due process. The right to scrutinize the jurors selected is part of that due process. This was denied defendant, and if he had a chance to prove that the jury was improper, he was hindered in doing so when deprived of the jury list. The burden of proving that the jury was improper was on defendant, Hanson v. United States, 393, F.2d 763, Bloomer v. United States, 409 F.2d 869, (9th Cir. 1969) and he had a right to determine who was on the panel so that he could judge to his satisfaction whether a challenge to the jury was likely to succeed.

- (4) WHETHER THIS COURT CAN REVIEW AND SET ASIDE AS ERRONEOUSLY BASED A 10 TO 30 YEAR SENTENCE FOR ARMED ROBBERY, THE SENTENCE BEING BASED IN PART APPARENTLY, UPON ERRONEOUS INFORMATION THAT THE DEFENDANT RECEIVED A TWO-YEAR SENTENCE AS AN ADULT OFFENDER WHEN HE WAS IN FACT A JUVENILE.

Appellant challenges the events surrounding his sentence, United States v. James McCoy, U.S. App. D.C. Nos 22,792, 23,090 (1970). In particular, Appellant states that on the record of this case, after compiling the instances of comment by the judge on the Appellant, the sentence, while within the limitation statute, was so severe as to warrant review by this Court. Upon review, Appellant prays that this Court will find that the sentence was based on erroneous information and that it did not take into account the possibility that, if he was treated for his narcotic addiction, rehabilitation was at least feasible in less than 10 to 30 years. Nor did he show that he gave consideration to sentencing under the Federal Youth Corrections Act, 18 U.S.C. 5005 et seq, although consideration was requested during allocution (Sentencing Transcript 2).

At the time of the offenses for which he was sentenced, Appellant was 19 years of age. By the time he

was convicted and sentenced he had turned 21. He was at the time of the crime and the trial a heavy heroin user. He was a juvenile offender, with a record of six non-violent offenses charged to him.

The robbery in this case was Proctor's first truly adult offense. The trial court erroneously assumed that a shoplifting offense committed in the spring of 1966 was an adult offense. Ordinary arithmetic shows that Proctor could not have reached his 18th year when that offense took place.

While on bond, Proctor was arrested on four occasions but was convicted but once, for "CDW", for which he evidently received 90 days in jail.

With that background before him, the judge imposed 10-30 years for armed robbery and 3-10 years for assault with a dangerous weapon, the sentences to run concurrently.

The judge sentenced under the erroneous impression that prior to this offense, Appellant had been sentenced while an adult for shoplifting. In this belief the Court was misinformed. On the record, Appellant was a juvenile when so sentenced.

The obvious question is, did the error matter?

To appellant in this kind of case, the sentence may well be of the utmost importance. Since the judge believed, as he stated, that he had before him a person convicted of a prior adult crime, this may have accounted in part for the severity of the sentence.

At the least, this Court should cause inquiry to be made of the sentencing judge as to whether his belief that there was a prior adult record influenced him at the sentencing. If, where the sentence on the record seems ferocious or unduly severe, and the judge be silent as to the reasons for that sentence, there is prima facie either an abuse of discretion on the part of the judge or a failure to exercise his discretion (cf Langnes v. Green, 282 U.S. 531 (1931)).

Moreover, in the exercise of discretion, consideration should have been given to sentencing under the Federal Youth Corrections Act, the defendant being within that age group and also being a first time felon, according to the charge.

From the record here, one knows only that the request was made by defense counsel and apparently by the defense for Youth Act sentencing. We do not know the

judge's mental processes, of course, but he may have dismissed the suggestion out of hand. This he is not permitted to do.

That this Court has the power, and in a sense the duty to do so in the case of apparently ferocious or unduly severe sentences, to review the sentencing process to make certain that it meets the standards of due process of law and whether the sentence is based on unwarranted assumptions, see Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, Scott v. United States, U.S. App. D.C. No. 20,954, decided February 13, 1969, Coleman v. United States, 123 U.S. App. D.C. 103, 357 F.2d 563 (1965), United States v. Damon Alston, _____ U.S. App. D.C. _____, 420 F.2d 176 (1969), and United States v. James McCoy, U.S. App. D.C. Nos. 22,797 and 23,090, decided June 19, 1970, United States v. Straite, _____ U.S. App. D.C. _____ (1970) 425 F.2d 594, Albert Watson v. United States, U.S. App. D.C., Nos. 21,186, 21,269 (1970).

In Barnett v. United States, _____ U.S. App. D.C. _____ (1968), 403 F.2d 918 this Court, while not expressly deciding on the merits of a sentence stated that it did not agree with defense counsel that the sentence was unduly severe.

There are, of course, numerous holdings that there is no right to appellate review^{of sentences}/in the Federal Courts (cf United States v. Martell, 335 F.2d 764(4th Cir. (1964)). But this does not render this court powerless, as seen in the numerous cases cited in the last paragraph. The Court ~~does~~ exercise its power to review the legality and propriety of the process of sentencing.

Appellant urges the Court, in exercise of its supervisory functions to order the Court below in sentencing to make findings on all controverted issues relevant to the sentencing decision and to state the reasons for the sentence. For a suggested rule, the Court's attention is called to §5.6 Imposition of Sentence, Tentative Draft Standards Relating to Sentencing Alternatives and Procedures, American Bar Association Project on Minimum Standards for Criminal Justice.

Such a rule would go far toward insuring the impecability of the sentencing process. Moreover, it will make the process visible to this Court. There is no reason to rush defendants to the lockup after sentence and deprive them of hearing the reasons for the sentence.

- (5) WHETHER THE JUDGE UPON BEING INFORMED THAT THE DEFENDANT WAS A HEAVY USER OF HEROIN SHOULD HAVE SPONTANEOUSLY ORDERED AN EXAMINATION TO DETERMINE WHETHER THE CRIME WAS THE PRODUCT OF THE EFFECTS OF THE HABITUAL USE OF HEROIN, AND WHETHER THE TRIAL SHOULD HAVE BEEN ADJOURNED UNTIL A MEDICAL DETERMINATION WAS MADE AS TO WHETHER THE DEFENDANT WAS FIT TO STAND TRIAL.

(Please read Government's Opposition to Motion for Release Pending Appeal)

According to the Appellee, Appellant was apparently addicted to heroin (20 capsules per day) and had been so addicted since 1968. It was reported to the Court that Proctor and a co-defendant were using narcotics in the United States Court House during the trial. The judge ordered a physical examination and urinalysis (Misc. Docket No. 106-69) with no disposition indicated.

Appellant contends that the Appellate Court should require the trial court to place in the record the result of that examination and urinalysis and if there is shown to be the addiction^{to} and immediate use of heroin at trial, there be a hearing held to determine whether Appellant was competent to stand trial and whether the crime was caused by the habitual and compulsive use of drugs.

United States v. Carter, U.S. App. D.C. No. 22,912, de-

cided June 5, 1970. See also Heard v. United States, 121 U.S. App. D.C. 37 (1964), 348 F.2d 43, and Lewis v. United States, 119 U.S. App. D.C. 145, (1964) 337 F.2d 541, United States v. Collins, No. 22,550, U.S. App. D.C., decided August 28, 1970, and United States v. Louis W. Gaines, No. 23,369 USCA DC, decided August 27, 1970.

